

ESTATE OF CLARENCE WILSON

IBIA 91-66

Decided April 23, 1992

Appeal from an order of modification issued by Administrative Law Judge S.N. Willett in Indian Probate IP SA 83N 86.

Reversed in part.

1. Indian Probate: Indian Land Consolidation Act: Escheat

With respect to any Indian estate in which interests are presumed to escheat under sec. 207 of the Indian Land Consolidation Act, 25 U.S.C. § 2206 (1988 and Supps.), evidence must appear in the probate record showing that (1) the Administrative Law Judge informed individuals who would otherwise inherit the interests that they have the right to attempt a rebuttal of the presumption and (2) such individuals were provided with an opportunity to exercise their right of rebuttal.

2. Indian Probate: Escheat--Indian Probate: Indian Land Consolidation Act: Escheat

Under 25 U.S.C. § 2206(b) (1988 and Supps.), an Indian testator may devise an interest in trust or restricted property that would otherwise escheat under 25 U.S.C. § 2206(a) (1988 and Supps.) to any person who owns an interest in that property.

APPEARANCES: Peter J. Sferrazza, Esq., Reno, Nevada, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Eunice T. Conway seeks review of a February 14, 1991, order of modification issued by Administrative Law Judge S.N. Willett in the estate of Clarence Wilson (decendent). For the reasons discussed below, the Board of Indian Appeals (Board) reverses that order as it pertains to Walker River Allotment 26.

Background

Decendent, an unallotted Paiute, died on September 14, 1985. A hearing to probate his trust or restricted estate was held before Administrative Law Judge William E. Hammett on July 11, 1986. Decendent never married and

had no children. He was survived by a half-brother and two half-sisters, including appellant. By order dated October 30, 1986, Judge Hammett approved decedent's May 14, 1985, last will and testament, under which decedent devised all of his trust or restricted property to appellant. No appeal was taken from this order.

The next action regarding decedent's estate that is relevant to this appeal occurred on January 24, 1991, when the manager of the Albuquerque Land Titles and Records Office, Bureau of Indian Affairs (BIA), wrote Administrative Law Judge S.N. Willett requesting a modification of the inventory of decedent's estate. The memorandum states:

Attached is a proposed Order of Modification to the inventory of the estate of the decedent, Clarence Wilson, Unallotted Paiute. This Order adds Walker River Allotment Nos. 26 and 425, which were received through a Modified Order Determining Heirs dated December 24, 1987, in the estate of Woodrow Collins, Prob. No. IP SA 121N-86. The decedent's interest in allotment no. 26 is less than two percent and the Western Nevada Agency has verified that this allotment did not meet the earnings test set forth in Section 207 of the Indian Land Consolidation Act [ILCA, 25 U.S.C. § 2206(a) (1988 and Supps.) 1/].

Pursuant to the provisions of Section 207 of [ILCA] * * *the decedent's interest in Walker River Allotment no. 26 should escheat to the Walker River Indian Tribe.

The inventory attached to the memorandum shows that the interest in Allotment 26 which had passed to decedent from Collins' estate was 0.0104167, and that the interest had an appraised value of \$31. 2/ A notation on the inventory states: "This interest is less than two percent and did not produce \$100.00 in income in any one of the five years preceding the owner's death." No documentation supporting the conclusion that the interest earned less than \$100 was included.

The order of modification was issued on February 14, 1991. It states:

The decedent's interest in Walker River Allotment No. 26 is less than two percent and did not meet the earnings test as set forth in the 1984 Amendment to Section 207 of the Indian Land Consolidation Act. Therefore the decedent's interest in Walker River Allotment No. 26 shall pass to the Walker River Indian Tribe provided that the 1984 Amendment to the Act is not conclusively

1/ All further references to the United States Code are to the 1988 edition and later Supplements.

2/ The Board has reviewed the probate record in the estate of Woodrow Collins. Decedent received a 1/96 interest in Allotment 26 through inheritance from Collins, who owned a 1/12 interest in the allotment at the time of his death. Because Collins' interest in the allotment was more than 2 percent, the escheat provisions of ILCA did not apply.

held unconstitutional. In the latter event, such interest shall pass to the decedent's heirs-at-law named with the shares determined in the original order.

The Board received appellant's notice of appeal from this order on April 9, 1991. Only appellant filed a brief on appeal.

Discussion and Conclusions

Appellant challenges the conclusion that decedent's interest in Allotment 26 has not met the earnings test set forth in 25 U.S.C. § 2206(a). She supports her appeal with affidavits from herself; her husband, Lawrence Conway; and her sister, Katherine Breckenridge. These affidavits state that appellant currently owns approximately 20 percent of the interest in Allotment 26, and that she and her husband have farmed this allotment for the past six years. Appellant states that the allotment has earned in excess of \$9,600 in at least one year subsequent to decedent's death. Income of \$9,600 for the allotment would result in an income of \$100 for decedent's interest in the allotment. Appellant argues that the Judge erred in escheating this interest based upon the estimates given by the Realty Officer, without any documentation of the allotment's actual earnings.

[1] In Estate of Guadalupe Almanza Conger, 21 IBIA 244, 248-49 (1992), the Board stated:

It is clear that section 207 weighs heavily in favor of escheat. Individuals who wish to attempt a rebuttal of the presumption favoring escheat face a difficult task. They have no chance at all of defeating escheat, however, if they are not informed of their right to attempt a rebuttal. In order to protect the due process rights of such individuals and to implement the trust responsibility of the United States toward them, * * * [t]he Board * * * holds that, with respect to any estate in which interests are presumed to escheat under section 207 of ILCA, evidence must appear in the probate record showing that (1) the Administrative Law Judge informed individuals who would otherwise inherit the interests that they have the right to attempt a rebuttal of the presumption and (2) such individuals were provided with an opportunity to exercise their right of rebuttal.

The probate record in this case does not show that appellant was informed of her right to attempt to rebut the presumption of escheat. Ordinarily, the Board would remand this matter to the Judge to give appellant this opportunity.

[2] Here, however, there is an additional problem, which, although it was not raised by appellant, the Board addresses under its authority in 43 CFR 4.318 to correct a manifest injustice or error. 25 U.S.C. § 2206(b) provides: "Nothing in this section [concerning escheat of interests of two percent or less] shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land." In other words, a testator may

devise an interest that would otherwise escheat to any person who owns an interest in the same allotment. This provision has been in effect since before decedent executed his will on May 14, 1985.

Appellant has submitted an affidavit stating that she owns approximately 20 percent of the interest in Allotment 26. The Board contacted the Western Nevada Agency, BIA, and verified that appellant does own an interest in Allotment 26. Because section 2206(b) allows the devise of an otherwise escheatable interest to a person who owns an interest in the allotment, decedent's interest in Allotment 26 should have passed to appellant in accordance with decedent's will and section 2206(b).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Willett's February 14, 1991, order is reversed in part. Decedent's interest in Allotment 26 should pass to appellant.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge